IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

MICHAEL DALE RIMMER,	)	
	)	CCA No. _____
Petitioner-Appellant,	)	
	)	Case below:
v.	)	Shelby County Case Nos. 98-01034, 97-02817, & 98-01033
	)	
STATE OF TENNESSEE,	)	
	)	(POST-CONVICTION)
Respondent-Appellee.	)	(CAPITAL CASE)

APPLICATION FOR PERMISSION TO APPEAL, PURSUANT TO T.R.A.P. 10, THE POST-CONVICTION COURT'S ORDER DENYING PETITIONER'S MOTION TO DISQUALIFY DISTRICT ATTORNEY'S OFFICE

Counsel for Petitioner/Applicant
Michael Dale Rimmer

Kelly A. Gleason, BPR ##22615
Assistant Post-Conviction Defender

Daniel E. Kirsch, BPR #26863
Assistant Post-Conviction Defender

Office of the Post-Conviction Defender
P. O. Box 198068
Nashville, TN37219-8068
(615) 741-9331
(615) 741-9430 (fax)

IF GRANTED, ORAL ARGUMENT REQUESTED

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Introduction

Michael D. Rimmer respectfully moves this Court to grant permission to appeal, pursuant to T.R.A.P. 10, the Order of the court below denying disqualification of the Shelby County District Attorney's Office. *See* Attachment 1 (Order filed May 20, 2011). Petitioner moved to disqualify the office due to the conflict of interest and appearance of impropriety created by Assistant District Attorney Thomas Henderson's presentation of false testimony at the trial of this case, his withholding of exculpatory evidence from Mr. Rimmer's trial counsel, his supervisory role in the office, and the uncorrected pattern of *Brady* violations committed by the office and Mr. Henderson.

Despite finding that 1) false testimony was presented at trial regarding the results of eyewitness James Darnell's identification of one of the two perpetrators in

a photospread, 2) Mr. Henderson knew or should have known that the testimony was false, and 3) a *Brady* violation likely occurred, the post-conviction court nonetheless found that no conflict of interest or appearance of impropriety exists in the continued prosecution of this case by the District Attorney's Office. Attachment 1, 46. However, because he may become a witness, the court precluded Mr. Henderson from "assisting the Shelby County District Attorney General's office in its representation of the state's interest during petitioner's post conviction proceedings." *Id.*, 44.

Applicant sought permission to appeal pursuant to T.R.A.P. 9, *see* Attachment 2 (T.R.A.P. 9 application, June 16, 2011).[1] The court below denied the application on July 11, 2011 after oral argument by the parties. *See* Attachment 3 (Transcript, July 11, 2011). The post-conviction court abused its discretion in denying disqualification by applying an incorrect legal standard and by reaching a decision which is against logic or reason and causes an injustice to Mr. Rimmer. *See State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999).

Although Applicant is cognizant of this Court's heavy caseload, the fact that the prosecutor disqualification issue must be settled prior to the impending hearing on the merits of the post-conviction petition, (*see* Attachment 5, Tennessee Supreme Court Order, June 14, 2010), compels Applicant to request expedited review. The post-conviction hearing is scheduled to begin December 12, 2011. The continuing

[1] The Rule 9 application was sent via Federal Express next day delivery on June 16, 2011 and an emailed confirmation of receipt by the Shelby County Criminal Court Clerk was received by undersigned counsel on the morning of June 17, 2011. For some reason, the application was file-stamped by the clerk many days later, June 23, 2011.

representation of the State by the District Attorney's Office presents an ongoing ethical violation which must be resolved promptly. The fundamental interests involved – "due process of law, the orderly administration of justice, the dignity of the courts, the honor and trustworthiness of the legal profession and the interests of the public at large"[2] – require immediate review.

Brief Procedural History

This is a capital post-conviction case. Mr. Rimmer's conviction and sentence were affirmed in 2008. The prosecutorial disqualification issue was before the post-conviction court following a remand from the Tennessee Supreme Court's partial grant of Petitioner's Rule 9 application. The Supreme Court ordered a remand "for the purpose of conducting an evidentiary hearing to determine whether the district attorney general should be disqualified from further participation in this case...." *See* Attachment 4 (Order, September 24, 2010). The Supreme Court held that a determination concerning disqualification must be made before the hearing on the underlying post-conviction petition. *Id.*[3]

Applicant presented much of the evidence supporting the disqualification at an August 21, 2009 evidentiary hearing regarding discovery of exculpatory evidence. Following the Supreme Court remand, the post-conviction court held an additional evidentiary hearing on January 24, 2011 at which Lucian Pera, an expert in legal ethics and professional responsibility, explained that disqualification of the

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[2] *State v. Phillips*, 672 S.W.2d 427, 435-6 (Tenn. Crim. App.1984).

[3] This Court had denied review of the disqualification issue, finding that the issue was reviewable upon an appeal of right. *See* Attachment 5 (Order, June 14, 2010).

District Attorney's office is required due to an actual conflict and an appearance of impropriety.[4] *See* Attachment 6 (Transcript, January 24, 2011).

On March 10, 2011, the parties deposed former District Attorney General, now Director of Homeland Security, William Gibbons regarding his decision not to disqualify, the office's history of suppressing exculpatory evidence, and whether Mr. Henderson was investigated or reprimanded in any of the cases where he was found to have suppressed exculpatory evidence.[5] *See* Attachment 7, (Deposition transcript, March 10, 2011). Also, the court took judicial notice of court orders in the Michael Sample and Dan Jones capital cases in which two Shelby County courts found that Mr. Henderson withheld exculpatory evidence, and in a Montgomery County capital trial in which the court found that Mr. Henderson committed prosecutorial misconduct in closing argument in blatant disregard of the Supreme Court's directive to not make arguments based on the Bible.

Thus, the record presented before the Court in this Rule 10 Application is pursuant to the Tennessee Supreme Court's remand order and substantially expanded since this Court's previous review of Petitioner's Rule 9 Application. An extraordinary appeal is warranted and necessary because, as the Supreme Court

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[4]Paul Boyd, Human Resources Officer for the Shelby County District Attorney's Office also testified regarding the organizational structure of the Office. Specifically, he testified about the roles Mr. Henderson and Mr. Campbell have served, as well as Mr. Henderson's tenure in the office and promotions over the years. At the time the disqualification motion was filed in September 2009, Mr. Campbell reported directly to Mr. Henderson and Mr. William Gibbons was the District Attorney. By January 24, 2011, Mr. Campbell was the Deputy District Attorney and direct supervisor of Mr. Henderson and Ms. Amy Weirich became the District Attorney General.

[5] Applicant has issued a subpoena for Mr. Gibbons and intended to call him at the January hearing but he was unavailable on that date.

recognized, the disqualification issue requires immediate review. Counsel disqualification issues, particularly where ethical considerations are at stake, are the proper subject of appeals under T.R.A.P. 10. *See State v. Jones*, 726 S.W.2d 515 (Tenn. 1987) (defense counsel laboring under conflict of interest).

In fact, the Tennessee Supreme Court found that a patent conflict of interest disqualified the entire Shelby County Public Defender's Office in representing Applicant in the direct appeal from his conviction. *See* Attachment 8 (*State v. Rimmer*, No. 02C01-9905-CR-00152, November 24, 1999, Order of the Tennessee Supreme Court granting the Shelby County Public Defender's Rule 10 Application to appeal this Court's denial of a Motion to Withdraw). Mark Ward, the attorney handling the appeal for the Public Defender, filed the Rule 10 upon denial of his motion to withdraw, citing the conflict created by Applicant's bar complaint and legal malpractice suit against trial counsel. The Supreme Court found a "patent conflict of interest for any lawyer in the Public Defender's Office" to represent Mr. Rimmer in the appeal due to a pending bar complaint and malpractice suit. The Court stated "the Board of Professional Responsibility complaints against the Shelby County Public Defender and the civil lawsuit alleging malpractice against the Public Defender create a patent conflict of interest for any lawyer in the Public Defender's Office...." *Id.,* p. 2.

If a conflict of interest involving allegations of attorney misconduct and malfeasance ethically precluded the entire public defender's office from this case on direct appeal – which is an inherently record-based representation – then the

unique and extreme circumstances of this case similarly justify immediate review and disqualification of the District Attorney's Office.

QUESTION PRESENTED FOR REVIEW

Whether, given the post-conviction court's findings that the trial prosecutor knowingly presented false testimony in this capital case and likely withheld exculpatory evidence, and given that the District Attorney's Office categorically denies any knowing presentation of false testimony and refuses to investigate the circumstances of the presentation of the false testimony, a conflict of interest and appearance of impropriety exist which require disqualification of the District Attorney's Office?

FACTS DEMONSTRATING THE NECESSITY OF AN EXTRAORDINARY APPEAL

Knowing Presentation of False Testimony on a Critical Issue

- On February 8, 1997, in the early morning hours, Ricci Ellsworth was discovered to be missing from the office of Memphis Inn, where she worked as a clerk.

- The night clerks at the Memphis Inn worked in a secure office area behind a locked entry door which divided the clerk's office from the public area.

- On February 13, 1997, Army Sgt. James Millen Darnell, Jr., gave a statement to Memphis Police officers at the Homicide Office, that he was at the Memphis Inn between 1:30 and 2:30 a.m. in the morning of February 8, 1997.

- Sgt. Darnell stated that he saw two men with blood on their hands at the Memphis Inn.

- Sgt. Darnell saw a red haired man, who appeared to be intoxicated, initially in the parking lot and then walked into the night entrance area of the Memphis Inn with him.

- When Sgt. Darnell first saw the red haired man, the man was standing behind a car with its trunk open. The car was a gray, 4-door, compact, Honda-civic type sedan.

- Sgt. Darnell saw a dark haired man in the night clerk's office. The dark haired man passed money under the window to the red haired man.

- Sgt. Darnell noticed that the door to the night clerk's office from the lobby was open.

- Sgt. Darnell described the man who was in the parking lot who entered the motel with him as white, mid-20's, 5 foot 6 inches, 150 pounds, mustache, neck-length light red hair, freckles on his left forearm, orange and white baseball cap, white t-shirt with torn left sleeve, blue jeans, tennis shoes, and a wristwatch on the left arm. The man's right hand was bleeding to the point that stitches would be needed.

- Sgt. Darnell described the man who appeared to be "the clerk" as white, mid-30's, 5 foot 7 inches, 160 pounds, collar length brown hair, thin mustache, dark blue jacket, black collared shirt under the jacket which was buttoned up to the second button, and bleeding from the knuckles of his left hand.

- Neither of the two men were described by Sgt. Darnell as balding with trim brown hair, which was Michael Rimmer's appearance in February 1997.

- Sgt. Darnell assisted the Memphis Police Department in creating composite sketches of the two individuals he saw in the Memphis Inn lobby and night clerk's office in the early morning of February 8, 1997.

- On February 28, 1997, The Commercial Appeal published the composite sketches in a story titled "Two Men Believed to be Responsible in Clerk's Abduction."

- On February 28, 1997, Memphis Police Sgt. D. O'Conner received a call from Arkansas State Trooper Jackie Clark. Clark reported that he received a call from a Johnny Whitlock advising him that he had seen the news and recognized the two composite drawings as friends of his named Billy Voyles and Raymond Cecil, Jr.

- Sgt. O'Conner retrieved a record on Billy Voyles and obtained photographs of Voyles to add to a photospread.

- On May 30, 1997, Memphis Police Sgt. O.W. Stewart was informed by Memphis Police Sgt. R.D. Roleson, Safe Streets Task Force (STFF), that Army Sgt. James M. Darnell positively identified the man in photospread "AA" position #5, as one of the two white males in the Memphis Inn lobby/clerk area in the early morning of February 8, 1997.

- The photograph in photospread "AA" position #5 is Billy Wayne Voyles, Jr.

- On May 30, 1997, Memphis Police learned that a capias warrant previously had been issued for Billy Wayne Voyles, Jr., for charges of attempted murder in the first degree and attempted especially aggravated robbery.

- On May 30, 1997, Memphis Police advised Assistant Attorney General Tom Henderson of the development regarding Voyles.

- Tom Henderson came to the homicide office and, after consultation, authorized extradition of Voyles on his pending attempted murder and robbery charges, and sent the authorization to the fugitive squad for entry into N.C.I.C.

- Tom Henderson signed the form authorizing extradition of Billy Wayne Voyles, Jr., on May 30, 1997.

- In June 1997, Sgt. Darnell signed a photospread indicating that "AA" numbered "5" was one of the two men he saw on February 8, 1997 at the Memphis Inn with blood on his hands.

- Michael Dale Rimmer was indicted on charges of premeditated murder in the first degree and felony murder on January 29, 1998.

- On March 4, 1998, Mr. Rimmer's defense counsel filed a motion for discovery for "FBI reports and/or any exculpatory evidence."

- On March 4, 1998, Mr. Rimmer's counsel filed a motion for production of exculpatory evidence, including the names of any witnesses "who have been unable to identify the accused from photographs, line-ups, or other attempts at identifying the accused as being perpetrator of the pending criminal charges."

- On March 16, 1998, Assistant District Attorney Tom Henderson filed a response of the State to defendant's discovery motion asserting that the State was "now unable to determine whether information in the possession of the prosecution is exonerative of the defendant or whether Brady v. Maryland ... applies to any such information."

- On March 16, 1998, Assistant District Attorney Tom Henderson filed a response of the State to defendant's motion for production of exculpatory evidence. The response stated "[t]he State of Tennessee is now unaware of any evidence which tends to exculpate the defendant of the crime charged against him."

- At Mr. Rimmer's trial in November 1998, Sgt. Darnell did not testify and no questions regarding what he saw and did were asked.

- Mr. Rimmer was convicted and sentenced to death. On appeal, the Court of Criminal Appeals of Tennessee reversed the death sentence and remanded the case for a new sentencing trial due to multiple errors in regard to the sentencing verdict, finding that "the trial court was without authority to covertly and substantially revise the jury's verdict."

- On November 10, 2003, petitioner's defense counsel filed a Motion for Production of Exculpatory Evidence, requesting an order that the State reveal exculpatory evidence, including names of any witnesses "who have been unable to identify the accused from photographs, line-ups, or other attempts at identifying the accused as being the perpetrator of the pending criminal charges."

- On November 13, 2003, Tom Henderson filed the State's response to the motion for production of exculpatory evidence, asserting that the "State is not aware of any 'misidentification' in this case. It should be noted that the identification witnesses in this case are friends, co-workers and other acquaintances of defendant."

- Tom Henderson's response also asserted that the State was "now unable to determine whether information in the possession of the prosecution is exonerative of the defendant or whether *Brady v. Maryland* ... applies to any such information."

- At petitioner's sentencing trial in 2004, Robert Shemwell, the Memphis Police case officer in charge of investigating Ms. Ellsworth's disappearance, was cross-examined about Sgt. James Darnell, over Tom Henderson's objections.

- At a bench conference, Tom Henderson stated, regarding James Darnell, "I've tried to locate this witness and haven't been able to get him."

- During the jury-out hearing, Shemwell testified the FBI in Hawaii showed James Darnell a fifty-plus photograph photospread and that Sgt. Darnell "identified Michael Rimmer and another individual as someone that looked familiar to him" but could not positively identify Rimmer as one of the two men at the motel.

- Shemwell testified at the jury-out hearing that an investigative report from the FBI with that identification information should be in the file.

- The Court then recessed for approximately two hours while Shemwell and Henderson reviewed the file. Upon return, in a jury-out hearing, Henderson questioned Shemwell about whether they had just reviewed "the entire file."

- Shemwell testified at the jury-out hearing that they had reviewed the file and did not find any supplements or FBI documents regarding the Darnell photospread identification results.

- Tom Henderson stated to the Court that Shemwell "never got any written report back from it and we don't have a written report back from it."

- In his testimony before the jury, Shemwell testified that Darnell viewed the fifty-plus photograph photospread and "could not positively identify anyone."

- Sgt. James M. Darnell, Jr., did not testify at the 2004 resentencing trial.

- On January 13, 2004, Michael Rimmer was sentenced to death.

The District Attorney's Position on the Presentation of False Testimony

- On September 18, 2009, the District Attorney, through Deputy (then Assistant) District Attorney John Campbell, filed a response to the motion to disqualify categorically denying that any misconduct was committed by Tom Henderson.

- The District Attorney denies that Tom Henderson knowingly presented false testimony and/or suppressed exculpatory evidence.

- William Gibbons, Shelby County District Attorney from November 1996 to January 2011, made the final decision of the office to oppose disqualification.

- Mr. Gibbons did not conduct any investigation into Tom Henderson's presentation of false testimony and did not question Henderson about the presentation of false testimony in making the decision to oppose disqualification.

Tom Henderson's Role in the District Attorney's Office, the Pattern of Misconduct, and the Absence of Remedial Action

- Tom Henderson has been a prosecutor in the Shelby County District Attorney's office since 1976.

- Tom Henderson was promoted over the course of his career and has been the Administrative Assistant over the Criminal Courts since September 2006.

- Tom Henderson was appointed as Training Director for the office during District Attorney William Gibbons' tenure.

- Mr. Gibbons considers Tom Henderson to be highly educated, highly trained, and highly aware of all of his legal obligations and professional responsibility obligations.

- In December 2006, Judge Paula Skahan, Division I, Shelby County Criminal Court declared a mistrial in the capital murder trial of *State v. Dan Jones* due to Rule 16 discovery violations and suppression of exculpatory evidence.

- Tom Henderson was lead counsel for the State in the *Dan Jones* case.

- The District Attorney, William Gibbons, was aware of the mistrial.

- The District Attorney did not investigate the reason for the suppression of exculpatory evidence, reprimand Tom Henderson in any way, or reassign the case to another prosecutor for the retrial. The District Attorney explained that he did not do so because there was no judicial finding that the suppression of exculpatory evidence was intentional.

- In November 2010, Dan Jones was retried and acquitted.

- On September 12, 2008, Judge Chris Craft issued an order finding that the Shelby County District Attorney suppressed exculpatory evidence in the capital murder post-conviction case *Michael Sample v. State.*

- Tom Henderson was one of the two trial prosecutors in the *Sample* case.

- Tom Henderson was the prosecutor who presented the testimony of eyewitness Melvin Wallace that Michael Sample shot him.

- The suppressed evidence in the State's file in the *Sample* case indicates that Melvin Wallace identified Larry McKay, not Michael Sample, as the person who stood over and shot him.

- District Attorney William Gibbons did not reprimand Tom Henderson in any way for suppressing exculpatory evidence in the capital murder case of Michael Sample or assign another prosecutor to lead the Criminal Courts division.

- During Mr. Gibbons' tenure, in addition to the *Sample* and *Jones* cases, state and federal courts issued opinions in several capital cases finding that the District Attorney's office had suppressed exculpatory evidence. Those cases include *(Erskine) Johnson v. State*, 38 S.W.3d 52 (Tenn. 2001); *Owens v. Guida*, 549 F. 3d 399 (6th Cir. 2008); and *Cone v. Bell*, 556 U.S. ____ (2009).

- William Gibbons testified that as District Attorney **he would not investigate any judicial rulings that his office suppressed exculpatory evidence unless a judge found that the suppression was intentional.**

- In the wake of the United States Supreme Court's reaction to his office's suppression of exculpatory evidence in *Cone v. Bell* and the attendant publicity, Mr. Gibbons was asked about instituting open file discovery procedures. He objected to protocols requiring open file discovery.

Summary of Expert in Legal Ethics Lucian Pera's Testimony

- Mr. Lucian Pera testified at the January 28, 2011 hearing on the motion to disqualify the Shelby County District Attorney's office.

- The Court qualified Mr. Pera as an expert in legal ethics and professional responsibility after a review of Mr. Pera's extensive qualifications and work in the subject matter.

- Mr. Pera testified that Tom Henderson has a conflict of interest and should be disqualified from representing the State in this matter under TRPC Rule 1.7(a)(2).

- Mr. Pera identified the conflict as the significant risk that Tom Henderson's personal interests – protecting his professional reputation, limiting any disciplinary or financial liability – might materially limit his ability to impartially fulfill his obligations as minister of justice.

- Mr. Pera testified that the inquiry is forward-looking and that whether the allegations are ultimately proven is irrelevant to the disqualification decision.

- Mr. Pera testified that the seriousness of the allegations and the amount of current available evidence in support of the allegations require disqualification.

- In addition to the TRPC Rule 1.7(a)(2) "material limitation" conflict, Mr. Pera also testified that the likelihood that Tom Henderson will be a witness requires his disqualification.

- Mr. Pera then analyzed and testified to the question of whether Tom Henderson's conflict extends to other members of the District Attorney's office. Mr. Pera testified that the conflict exists for other lawyers in the office due to their interest in protecting the office's reputation.

- Further, Mr. Pera testified that Tom Henderson's supervisory role in the office contributes to a heightened interest of the office in vindicating him from allegations of misconduct. This is true both for lawyers supervising Henderson and those supervised by Henderson.

- Mr. Pera also testified that "screening" as a remedy to the conflict was also not possible in this context.

- Mr. Pera testified that John Campbell has a Rule 1.7(a)(2) "material limitation" conflict as Tom Henderson's supervisor.

- Mr. Pera also testified regarding his analysis of the District Attorney's conflict under Tennessee case law, specifically *State v. Culbreath*, 30 S.W.3d 309 (Tenn. 2000).

- In *State v. Culbreath*, the Tennessee Supreme Court found that the entire Shelby County District Attorney's office was disqualified from prosecuting that case.

- Mr. Pera testified that the office has an actual conflict of interest which requires disqualification under *Culbreath*.

- Further, Mr. Pera testified that an appearance of impropriety exists which requires the District Attorney to disqualify. He testified that "a reasonable observer outside the office looking at those facts [the allegations of presentation of false testimony and the evidence available thus far supporting the allegations] would have doubts about the impartiality of the office."

- Mr. Pera testified that his opinion and analysis are very consistent with Advisory Ethics Opinion No. 2001-A-750. *See* Attachment 9 (Advisory Opinion). Although the advisory opinion was issued under the old rules of professional conduct, both the current ethical analysis and the specific facts of that case are quite similar to this case.

- Mr. Pera concluded his testimony with again emphasizing that the disqualification issue must be determined in light of what is known now and not what the ultimate outcome will be. He testified that he could not imagine anything worse than a lawyer, particularly a prosecutor, presenting false testimony and thus, he hopes that this will not ultimately be proven to be true. However, that does not change his opinion that disqualification of the office is required.

Relevant Findings Made by the Post-Conviction Court

- "Office[r] Shemwell provided false testimony" at the resentencing trial. Attachment 1, 46.

- "General Henderson knew; or, at the very least, should have known Officer Shemwell's testimony was false." *Id.*

- Both Shemwell and Henderson "misled the resentencing court." *Id.*, 53.

- "The court is particularly concerned about Henderson's representation to the court regarding Officer Shemwell's testimony." *Id.*

- "[I]t appears that a *Brady* violation likely occurred during petitioner's" resentencing trial. *Id.*, 46.

- The "court makes no findings regarding allegations that General Henderson committed *Brady* violations at petitioner's original trial." *Id.*, 45.

- "Shelby County Assistant District Attorney General Tom Henderson should be precluded from assisting the Shelby County District Attorney General's office in its representation of the state's interest during petitioner's post conviction proceedings." *Id.*, 44.

- Mr. Henderson is "precluded from directing the actions of other attorneys working on the case and from making strategic decisions regarding the State's representation." *Id.*, fn. 36.

- The court finds "no conflict of interest necessitating counsel's removal. However, the court does find that the potential appearance of impropriety would warrant General Henderson's disqualification." *Id.*, 44-45.

- The court "does not find that the entire Shelby County District Attorney General's Office, in particular Mr. Campbell, must be precluded from representing the state at petitioner's post conviction proceedings." *Id.*, 45.

- The court "finds no material limitation interfering with the performance of the duties of the Shelby County District Attorney General's Office which would require disqualification of the Office or, in particular, of Deputy Attorney General, John Campbell." *Id.*, 54.

- The court "finds no appearance of impropriety regarding the continued representation of the state's interest by the Shelby County District Attorney General's Office." *Id.*

Critical Factual Omissions of the Post-Conviction Court

The post-conviction court's order makes no reference to the State's discovery responses, including two filed on March 16, 1998, which represented that no *Brady* evidence existed. As the court found, the trial prosecutor, Mr. Henderson, was

aware, as of May 30, 1997, of eyewitness Sgt. Darnell's identification of Billy Wayne Voyles as one of the two perpetrators. Specifically, the prosecutor was aware that Voyles had been identified as the red-haired assailant. For that reason, the prosecutor personally authorized and signed the extradition form for Voyles to be brought to Memphis and questioned. The prosecutor was also aware that Mr. Rimmer was in the photo spread and that Sgt. Darnell had not identified him as someone he knew or had seen. It is inconceivable that the prosecutor, with his experience and training, inadvertently overlooked a critical piece of exculpatory evidence at the time he was charged with the duty of reviewing police reports and the evidence and responding to two separate *Brady* requests which specifically requested the results of any photo line-ups and identifications.

The prosecutor tried Mr. Rimmer under a single perpetrator theory, despite the fact that the only eyewitness, Army Sgt. James Darnell, saw **two** men with blood on their hands – one behind what should have been a locked door safely housing Ricci Ellsworth and **only** Ricci Ellsworth – passing money to another in the night entrance area. Sgt. Darnell gave descriptions of the two men which cannot be Michael Rimmer based on those descriptions. A friend of Billy Voyles in Arkansas saw the composite sketches on the news and called authorities to identify him as one of the two men in the composite sketches created with Sgt. Darnell's help. Billy Voyles' photo was placed in a photospread sent to Sgt. Darnell, who identified Voyles and did not recognize Mr. Rimmer.

The case against Mr. Rimmer is circumstantial. The only alleged motive was supplied by jailhouse snitches. Ms. Ellsworth has yet to be found, and the State has argued that she was alive after she left the motel. *See* Resentencing Trial, Vol. 11, 1040. No one saw Mr. Rimmer, or someone meeting his description, at the Memphis Inn that night. Several witnesses saw a car backed up to the sidewalk in front of the night clerk's office with the trunk open, but there was no blood in the trunk of the car in which the State claimed Mr. Rimmer placed Ms. Ellsworth.[6]

These facts raise serious questions about **why** the State withheld critical exculpatory evidence in this case and presented false testimony. These questions increase the appearance of impropriety of the further involvement of the Shelby County District Attorney's Office.

REASONS SUPPORTING AN EXTRAORDINARY WRIT

This case raises serious issues regarding the integrity of the judicial process in a capital murder case. Under the facts presented and those found by the post-conviction court, the Shelby County District Attorney's Office must be disqualified from this case.

The State, through Assistant District Attorney Henderson, impeded discovery of the exculpatory evidence in this case by representing that **no** exculpatory evidence existed, and presented **false testimony** asserting that the positive identification of Billy Wayne Voyles by eyewitness Army Sgt. James Darnell had

[6] The U.S. Attorney became involved in the case and was contemplating prosecution specifically because the Shelby County District Attorney had never successfully prosecuted a case in which no body had been found. Obviously, the prosecution is required to prove *corpus delicti*, which the State has not done in this case.

not in fact been made. The presentation of the false testimony violated Mr. Rimmer's constitutional right to due process of law.

"It is a well established principle of law that the state's knowing use of false testimony to convict an accused is violative of the right to a fair and impartial trial as embodied in the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, §§ 8 and 9 of the Tennessee Constitution." *State v. Spurlock*, 874 S.W.2d 602, 617 (Tenn. Crim. App. 1993) (citations omitted). "When a state witness answers questions on either direct or cross examination falsely, the district attorney general, or his assistant, has an affirmative duty to correct the false testimony." *Id.* (citations omitted); *Napue v. Illinois*, 360 U.S. 264 (1959) (holding that prosecutor's failure to correct false testimony violates due process).

Presentation of false testimony is an extremely egregious professional violation. *See, e.g., Hughes v. Board of Professional Responsibility of Supreme Court of Tennessee*, 259 S.W.3d 631 (Tenn. 2008) (refusing to reinstate attorney who was guilty of tampering with witness testimony, by employing bribery, in a first degree murder case). The SupremeCourt found that the egregiousness of Hughes' conduct "cannot be overstated" because his acts "demonstrated a flagrant disregard for the principles upon which our legal system is grounded." *Id.* at 651.

I. The Post-Conviction Court Abused Its Discretion By Applying an Incorrect Legal Standard

The post-conviction court abused its discretion by applying an incorrect legal standard in determining that no "material limitation" conflict exists. The disqualification analysis in this context must address 1) whether a conflict of

interest exists and, if not, 2) whether an appearance of impropriety precludes continued representation. The court below erroneously introduced a third step in the analysis – whether the petitioner will likely prevail on the merits of his claims regarding presentation of false testimony and *Brady* violations.[7] The introduction of this prong to the analysis is incorrect under *Culbreath, supra,* and the Rules of Professional Conduct, Rule 1.7.

The court found that disqualification was not required because the materiality of the false testimony in the context of the resentencing was "marginal" and the likelihood of success on the issue is "questionable." Attachment 1, 46. The court reasoned that such a conclusion, "as Mr. Pera suggested in his testimony, is important to this court's determination of whether a conflict of interest exists." *Id.* This is **precisely opposite** of both the correct conflict analysis and Mr. Pera's testimony.[8] Mr. Pera explained that even if the ultimate determination on the

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[7] The post-conviction court is not in a position to make that determination since there has been no merits hearing yet. The court unfairly penalizes the Petitioner for not calling trial counsel, Tom Henderson, and other witnesses who will establish the merits of the *Brady* and ineffective assistance claims. That is an issue for the hearing on the merits of the post-conviction claims. The whole point of addressing the prosecutorial disqualification **now**, rather than later, as was ordered by the Supreme Court in the Rule 11 remand is to ensure that the merits hearing is conducted by un-conflicted counsel and to avoid an appearance of impropriety.

[8] There are numerous factual errors in the order in addition to this serious legal error. For example, the order states that Mr. Pera testified that he was not aware that Mr. Campbell now served in a supervisory capacity over Mr. Henderson. *Id.*, 8 fn.16; 56 ("Despite Mr. Pera's assertion to the contrary, Deputy Campbell is not supervised by General Henderson.") Mr. Pera said no such thing; he was well aware that Mr. Campbell had been recently promoted and by the time of the hearing was Mr. Henderson's supervisor and in fact testified specifically about the conflict analysis due to that recent development. Attachment 6, 77-80. In addition to having discussed and analyzed this with undersigned counsel prior to his testimony, he was present in the courtroom when Mr. Boyd, the human

merits were to be that no misconduct whatsoever occurred, the analysis does not change:

> Not a bit. I mean, again, I think I've said this before. I want to say it again. I, you know, I don't know if the allegations here are true or false. I have no idea. And I think there's every reason, you know, to believe that may well be false at the end of the day. In fact, there's several of these cases that you've cited where there have been, there's been disqualification based on some prosecutor's supposed misconduct where ultimately the Court finds there is not misconduct. But the prosecutor is nevertheless disqualified. That's not the point. The point here is about looking forward and try to preserve the impartiality, the integrity of the system now and how it appears to the public in terms of its impartiality and integrity.

Attachment 6, 97. Upon questioning by the court about the relative importance of the presentation of false testimony and *Brady* allegations, Mr. Pera testified further:

> The combination of these two things is of much more concerning to me than merely the *Brady* violation. There's no question. And candidly, your Honor, I mean, you know, I don't know much, it's one of the reasons being an expert witness always gives me the willies in some sense. Because I don't know much worse a lawyer could do than lie or misstate something under oath. And I'm under oath here; right. The notion that a lawyer, the accusation that a lawyer somehow was complicit in or helped or urged a witness to lie is, I'm not sure what worse you can say about a lawyer. And candidly it would be worse to say, is worse to say about a prosecutor than an ordinary lawyer. And so that said, that's very troubling. And the notion that there seems to be whether it's true or not.

Id., 98-99. He continued:

> And that's what troubles me as much as anything else. And frankly in terms of the lawyer [as] witness thing, that's why, although I haven't heard anything about it, I am confident that at some point in this process you're going to hear from Mr. Henderson. And I, you know, frankly, as a lawyer, my person who hired me probably won't be happy

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resources officer, testified about the District Attorney Office's organizational structure and the recent changes in the office's administration.

> to hear me say this, but as a lawyer I hope the answer is that that's not true. Because I really, it bothers me anytime any lawyer would do anything like that. So I'm hoping, assuming that that's not true. That's not the issue. The issue is not about whether it's true or not.

Id., 99-100.

II. An Appeal of Right Cannot Effectively Remedy the Harm Done in a Conflict-Tainted Proceeding

The reason that the ultimate outcome on the merits is irrelevant lies in the importance of the interests at stake. The ethical rules, the caselaw, and the constitutional due process right are intended to protect the integrity of the judicial process and the way that the process is viewed by the public. The representation of a party is a fundamental, structural issue. *See Frazier v. State*, 303 S.W.3d 674, 683 (Tenn. 2010):

> [C]ourts have an independent duty to ensure that all proceedings are conducted within the ethical standards of the profession and are "fair to all who observe." *Wheat v. United States*, 486 U.S. 153, 160, 108 S.Ct. 1692, 100 L.Ed. 2d 140 (1988). When, therefore, the trial court is aware or should be aware of a conflict of interest, there must be an inquiry as to its nature and appropriate measures taken. [*Cuyler v. Sullivan*, 446 U.S. 335, 346-47 (1980)]; *see also* [*Wood v. Georgia*, 450 U.S. 261. 272 (1981)]. Otherwise, prejudice will be presumed. *Sullivan*, 446 U.S. at 349-50, 100 S.Ct. 1708.

Issues of counsel disqualification are frequently addressed in interlocutory appeals[9] precisely because the representation of a party is a fundamental, structural issue that cannot be remedied effectively upon a later appeal of right. *See Jones*, 726 S.W.2d 515 (Tenn. 1987) (Rule 10 appeal regarding whether defense

[9] Applicant uses the term "interlocutory appeal" to encompass both Rule 9 (Interlocutory Appeal by Permission by the Trial Court) and Rule 10 (Extraordinary Appeal by Permission on Original Application in the Appellate Court) to distinguish between those types of appeals and Rule 3 appeals of right.

counsel was laboring under conflict of interest); *State v. Rimmer*, No. 02C01-9905-CR-00152, (Tenn. November 24, 1999) (Rule 10 appeal regarding "patent conflict of interest for any lawyer in the Public Defender's Office"); *State v. Tate*, 925 S.W.2d 548 (Tenn. Crim. App. 1995) (Rule 9 appeal regarding disqualification of the Knox County District Attorney General); *State v. White*, 114 S.W.3d 469 (Tenn. 2003) (Rule 11 appeal regarding disqualification of defense counsel with dual roles as county prosecutor and defense counsel); *McCullough v. State*, 144 S.W.3d 382 (Tenn. Crim. App. 2003) (Rule 9 appeal of disqualification of defense counsel in post-conviction); *State v. Lipford*, 67 S.W.3d 79 (Tenn. Crim. App. 2001) (State's Rule 9 appeal regarding trial court's failure to disqualify defense counsel); and *Kevin Burns v. State of Tennessee*, W2000-02871-CCA-R9-PD, 2001 WL 912817 (Tenn. Crim. App. Aug. 9, 2001) (Rule 9 appeal by Burns regarding disqualification of the Post-Conviction Defender).

Accordingly, the necessity of disqualification of a district attorney's office is a matter for interlocutory review. *Tate*, 925 S.W.2d at 550. An interlocutory appeal, which by its nature prioritizes the interests of judicial economy and preservation of the integrity of the justice system, is the only practical review mechanism when a conflict impedes a district attorney's office from fulfilling its principal duty of seeking justice. The existence of a conflict of interest should cause an appellate court to reverse this case on appeal, even with no showing of prejudice. *Id.* at 552; *Frazier*, 303 S.W.3d at 683 ("prejudice will be presumed"). Thus, immediate resolution of the conflict is necessary to prevent the needless expenditure of great

time and effort in the post-conviction court carrying on an erroneous proceeding that an appellate court should ultimately reverse.

The interests behind avoiding a conflict or the appearance of impropriety extend beyond an individual case to our society as a whole:

> The rights of [the] defendant to a fair and impartial trial and due process of law, the orderly administration of justice, the dignity of the courts, the honor and trustworthiness of the legal profession and the interests of the public at large demand reversal of this conviction [due to the prosecutorial conflict].

State v. Phillips, 672 S.W.2d 427, 435 (Tenn. Crim. App. 1984). Thus, the appearance of impropriety alone justifies disqualification and immediate appellate review of the denial of disqualification. *See Tate*, 925 S.W.2d at 555. "Attorneys must not only avoid impropriety but even the appearance of impropriety." *Id.* Attention to this duty is even more important for a representative of the public. The district attorney general "as the representative of the people in state criminal prosecutions, must always endeavor to promote the public confidence in the integrity and impartiality of the criminal justice system." *Id.* The insult to the appearance of impartiality and integrity in proceedings cannot effectively be remedied by an appeal of right, which would occur long after the post-conviction proceedings and after extensive effort and expense.

III. An Actual Conflict of Interest and Appearance of Impropriety Exist in This Capital Case

Disqualification of prosecuting attorneys is required when the attorneys' representation is burdened by either an actual conflict of interest or an appearance of impropriety. *State v. Culbreath*, 30 S.W.3d 309, 312-13 (Tenn. 2000); *State v.*

Tate, 925 S.W.2d 548, 553, 556 (Tenn. Crim. App. 1995). The court must first determine whether an actual conflict of interest exists. *Culbreath*, 30 S.W.3d at 312-13. If not, the court must then consider whether the prosecutor's conduct has created an appearance of impropriety. *Id.*, 13. When a court finds a conflict of interest or an appearance of impropriety, the court must next determine whether the entire office should be disqualified. *Tate*, 925 S.W2d at 556.

Actual Conflict of Interest

An actual conflict of interest "includes any circumstances in which an attorney cannot exercise his or her independent professional judgment free of compromising interests and loyalties." *Culbreath*, 30 S.W.3d at 312 (internal quotation omitted). Tenn. R. Sup. Ct. 8, R.P.C. 1.7 (a)(2) states that a conflict of interest exists where "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."

The determination of the existence of whether prosecutors are burdened by a conflict of interest requires an examination of the specific ethical duties of prosecuting attorneys. *State v. White*, 114 S.W.3d 469, 477 (Tenn. 2003). A prosecutor

> is to judge between the people and the government; he is to be the safeguard of the one and the advocate of the rights of the other; he ought not to suffer the innocent to be oppressed or vexatiously harassed any more than those who deserve prosecution to escape; he is to pursue guilt; he is to protect innocence; he is to judge of circumstances, and, according to their true complexion, to combine the public welfare and the safety of the citizens, preserving both and not impairing either.

Foute v. State, 4 Tenn. (3 Haywood) 98 (1816). Because the prosecutors' function in our criminal justice system is unique, prosecutors therefore must shoulder unique ethical obligations:

> [P]ublic . . . prosecutors are expected to be impartial in the sense that they must seek the truth and not merely obtain convictions. They are also to be impartial in the sense that charging decisions should be based upon the evidence, without discrimination or bias for or against any groups or individuals. Yet, at the same time, they are expected to prosecute criminal offenses with zeal and vigor within the bounds of the law and professional conduct.

Culbreath, 30 S.W.3d at 314; *see* Commentary to Tenn. R. Sup. Ct. 8, R.P.C. 3.8 (The prosecutor "has the responsibility of a minister of justice whose duty is to seek justice rather than merely to advocate for the State's victory at any given cost.") The United States Supreme Court has said that a prosecutor:

> is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.

Berger v. United States, 295 U.S. 78, 88 (1935). In short, prosecutors must seek justice, not just convictions.

The prosecutors' responsibility to be ministers of justice does not cease once a case reaches post-conviction. Justice is still the primary interest of the sovereign state that the prosecutors represent. However, at the post-conviction stage, the prosecutors have already obtained a conviction and a petitioner is challenging the

legitimacy of the conviction (or sentence). Now, the prosecutors are faced with a competing duty of loyalty to their office and defense of the conviction, regardless of whether it was a just conviction.

Furthermore, prosecutors confronted with allegations of misconduct also have personal interests of vindication from the allegations. It is this divided loyalty that creates an actual conflict of interest. *U.S. v. Dyess*, 231 F.Supp. 2d 493, 498 (S.D. W.Va. 2002). "The potential conflict between protecting the good name of the office and its agents while ensuring that the Government's interests in justice are fully and fairly represented is clear and unavoidable." *Id.* On one hand, the prosecutors must serve the sovereignty's interest in justice. On the other, the prosecutors must serve the office's interest in maintaining the conviction it previously obtained, as well as serving their own personal interests of vindication.

Appearance of Impropriety

An appearance of impropriety also requires disqualification. Assessment of whether the appearance of impropriety warrants disqualification of an entire district attorney's office must be judged from the perspective of a reasonable person. "[B]ecause judges have a privileged understanding of the legal system, they may fail to find an appearance of impropriety where one would be found by a layperson. The existence of an appearance of impropriety should therefore be determined from the perspective of a reasonable layperson." *Clinard v. Blackwood*, 46 S.W.3d 177, 187 (Tenn. 2001).

The Unique Facts of This Case Demonstrate an Actual Conflict of Interest and an Appearance of Impropriety

The unique facts of this case meet both tests. A significant risk exists that personal interests of vindication and preservation of the office's reputation will materially limit the office's duty to be a minister of justice. Likewise, a reasonable person would not be satisfied that the District Attorney's Office can fulfill the duty of a minister of justice. Mr. Rimmer has been convicted and sentenced to die based on Mr. Henderson's presentation of false testimony stating that the eyewitness could not positively identify anyone when the testifying witness and Mr. Henderson **both** knew that Sgt. Darnell positively identified someone else as a perpetrator of the crime. Michael Rimmer was set to be executed on April 7, 2009, which is before the State's gross misconduct came to light – meaning he could have been killed without the truth being uncovered. It was discovered **only** due to post-conviction investigation, not through any act of contrition or correction by the State.

The State has had ample opportunity to attempt to repair the harm caused by this misconduct, but instead has flatly denied any wrongdoing – either regarding the false testimony or the *Brady* claims. *See* Attachment 10 (Response of the State to Petitioner's Motion to Disqualify District Attorney's Office, filed September 18, 2009); Attachment 11 (Argument of the State on Petitioner's Motion to Recuse, filed April 27, 2011). The State's position is that Mr. Henderson did nothing wrong and there was no *Brady* violation in this case because no exculpatory evidence was withheld. This position, however, appears to be grounded in the office's policy of refusing to investigate the facts that led the post-conviction court to conclude that

Mr. Henderson knowingly presented and withheld exculpatory evidence. When asked what investigation was made by the District Attorney before making the decision to take that position, Mr. Gibbons testified as follows:

> Q. Now, as to the Rimmer situation coming to your attention in August of 2009, what steps did you take to determine whether the presentation of false testimony by Mr. Henderson was knowing or unknowing?
>
> A. Well, again, there's nothing to my knowledge to indicate that it was knowing. And if there had been any indication that it was, then I would have taken steps on that.
>
> Q. And what investigation did you conduct in order –
>
> A. Mr. Campbell and I had discussed that case, obviously.
>
> Q. And what investigation did you undertake to determine whether Mr. Henderson had –
>
> A. You mean did I call Mr. Henderson in and interrogate him and ask him whether factually this was a knowing and intentional action his part, no, I did not interrogate him along those lines. But I looked at the decision in the case, and again, there was nothing in the record to so indicate.
>
> Q. Okay. And so, you were willing to take Mr. Henderson on his word?
>
> A. Well, in this case, of course it was the testimony of the officer on the stand, as I recall, and the officer made a mistake apparently.
>
> Q. And to be clear, you did not discuss with Mr. Henderson regarding whether it was knowing or unknowing presentation of false testimony?
>
> A. I do not recall specifically asking that, but there was no indication whatsoever that Mr. Henderson intentionally put this officer on the stand to lie.
>
> Q. And did you - I think you answered this earlier, but just to be clear -
>
> A. I said take that to lie, I mean, I'm not saying that the officer doesn't necessarily recall. But based on what appears to be the case now, is the

officer's testimony was incorrect. And I'm not saying that the officer intentionally gave false testimony, I don't know.

Q. And did you personally, or did you have anyone else review the exhibits that have been introduced thus far that indicate that Mr. Henderson was personally aware of the identification?

A. I'm not aware of that. Mr. Campbell is handling the case now, and you know, I'm sure he is reviewing all of that.

Q. So, when you made the decision to not – not to agree to disqualification of office, when you made the decision to categorically deny any wrongdoing by Mr. Henderson, that was not the result of any investigation or review of the file documents?

A. It was not the result of any independent investigation by me. It was based on the facts as I knew them at the time. And no indication that he had done any wrongdoing. And no finding that he had done so.

As this testimony demonstrates, the District Attorney's Office has taken the categorical position that Mr. Henderson did not knowingly present false testimony or withhold exculpatory information, without the District Attorney even reviewing the materials that establish the allegations and without conducting an internal investigation. Yet the facts to the contrary have been clearly established. For example, Mr. Henderson filed discovery responses in this case on March 16, 1998, stating that there was **no** exculpatory evidence, when he was aware, since May 30, 1997, that an eyewitness had picked someone out of photospread that was not the accused and that the eyewitness did not identify the accused. Moreover; upon learning that the eyewitness had identified Voyles, Mr. Henderson personally authorized his extradition for questioning.

The Office's denial, especially combined with Mr. Gibbons' other testimony stating that he did not investigate Mr. Henderson's culpability in withholding

exculpatory evidence in the Michael Sample and Dan Jones capital cases in the absence of findings by a court that the conduct was intentional, creates the perception that when the service of justice to Petitioner exposes the office to liability, or injury to its reputation, the interest of limiting liability is paramount. *See U.S. v. Dyess*, 231 F.Supp.2d 493, 497 (S.D. W.Va. 2002) ("[T]he interest of the U.S. Attorney's Office and that of the sovereign government may not be aligned because revelation of wrongdoing, which may be required in the service of truth and justice to these defendants, cannot help but cause reputational injury to the office.").

The office does not even **investigate**, no less penalize, prosecutors, and specifically Mr. Henderson, in the absence of a court order finding intentional misconduct. This is not the standard to which attorneys in Tennessee, and especially prosecutors, are held. *See* Rules of Professional Conduct, Rule 5.1(a) (supervisory lawyers in a firm "shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct); Rule 5.1(b) ("A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.); Rule 5.1(c)(ii) (A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if the lawyer "knows of the conduct at a time when its consequences can be avoided or mitigated, but fails to take reasonable remedial action."); Rule 3.8(d) (the prosecutor "shall make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of

the accused or mitigates the offense"); Rule 3.8, Comment 1("A prosecutor has the responsibility of a minister of justice whose duty is to seek justice rather than merely advocate for the State's victory at any given cost.").

Furthermore, the duty to seek justice does not evaporate when cases enter post-conviction. "The minister-of-justice model, if taken seriously, implies that prosecutors should take all reasonable steps necessary to verify whether an innocence claim is viable, and, upon achieving such confirmation, assist in exonerating that defendant." Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 Wash L.Rev. 35, 48 (2009). As one commentator has noted, during post-conviction, a prosecutor

> may learn facts that suggest that particular evidence introduced against a defendant was false or questionable – for example, when a regular police informant is shown to have testified falsely in other trials. It is again important to recognize the range of suspicion that these types of information can raise. In the most troublesome scenario, a prosecutor actually will learn of a specific problem that convinces her that the trial or evidentiary process was abused in a previously convicted defendant's case.

Fred C. Zacharias, *The Role of Prosecutors in Serving Justice After Convictions*, 58 Vand. L. Rev. 171, 178 (2005). In these situations, the source of the prosecutor's "obligation to act is the prosecutor's general ethical duty to see that justice is done." *Id.* at 181.

A prosecutor is required:

> to act when put on notice of the real possibility of false testimony. This duty is not discharged by attempting to finesse the problem by pressing ahead without a diligent and a good faith attempt to resolve

> it. A prosecutor cannot avoid this obligation by refusing to search for the truth and remaining willfully ignorant of the facts.

Commonwealth of Northern Mariana Islands v. Bowie, 243 F.3d 1109, 1118 (9th Cir. 2001). Yet this avoidance of the truth is precisely what has occurred, and will continue to occur, in the absence of an independent, un-conflicted prosecutor. It is the District Attorney's ethical **duty** to withdraw in this case and the office refuses to do so. Advisory Ethics Opinion, A-487 ("Prosecuting attorneys should seek to withdraw in a pending capital murder case due to allegations of impropriety against them by the principal witness, even though the allegations are denied.")

The high level supervisory roles of Mr. Henderson (Administrative Assistant in charge of the Criminal Courts) and Mr. Campbell (Deputy District Attorney with direct supervisory authority over Mr. Henderson) provide even more justification for disqualification of the District Attorney's office. *See, e.g., People v. Doyle*, 406 N.W.2d 893, 899 (Mich. App. 1987) ("If the assistant prosecuting attorney concerned in the conflict of interest has supervisory authority over other attorneys in the office, or has policy-making authority, then recusal of the entire office is likely to be necessary"); *Younger v. Superior Court*, 77 Cal.App.3d 892, 896-897, 144 Cal.Rptr. 34 (Cal. App. 1978) (disqualified lawyer in supervisory position); *State v. Latigue*, 502 P.2d 1340, 1341-1342 (Ariz. 1972) (disqualification required where conflicted attorney "has supervisory powers and duties over the assistant county attorney who is prosecuting.")

In addition, Mr. Henderson and Mr. Campbell are long-term colleagues – Mr. Henderson joined the District Attorney's office in 1976 and Mr. Campbell joined the

office in the 1980's. The two have tried capital cases together, most recently *State v. Henry Lee Jones*, Shelby County Case No. 03-06997, which resulted in a death sentence in May 2009. Also, for many years, Mr. Campbell handled all the capital post-conviction cases, including those initially tried by Mr. Henderson. Although the Petitioner does not assert, and has not asserted, that Mr. Campbell himself has consciously acted inappropriately in this matter, studies have shown that certain cognitive biases do affect one co-worker's assessment of another co-worker's decisions:

> Even when [post-conviction] petitions are distributed to other lawyers in the office, the status quo bias probably persists. Studies show that individuals within the same profession or organization frequently respect the decisions of their cohorts due to the power of "conformity effects," a desire to act in line with a peer. A person may be particularly reluctant to alter a colleague's decision where that colleague had access to greater information at the time of the preceding decision. This situation emerges when a post-conviction litigator reviews the work of a trial attorney who, among other things, interacted with witnesses and the police closer in time to the event that gave rise to the prosecution.
>
> Similar to the status quo bias, the "egocentric bias" shows that people generally like to craft a flattering vision of themselves and their occupation, and thus neglect or discount information that contradicts that positive self-image. These biases could infect not only the individual prosecutor reviewing his or her own trial work after procuring a conviction, but also a colleague analyzing the performance of a coworker in the organization.

Medwed, 84 Wash L.Rev. at 53 (footnote citations omitted).

Furthermore, given the history of misconduct by the District Attorney's Office and the specific pattern of misconduct Mr. Henderson has demonstrated, a reasonable member of the public would not have confidence in the integrity of the judicial system if the office continues to prosecute the case. The pertinent inquiry is

whether the "public would perceive continued prosecution by the district attorney's office, under the particular circumstances here, as improper and unjust, so as to undermine the credibility of the criminal process in our courts." *People v. Palomo,* 31 P.3d 879, 882 (Colo. 2001) (quoting *People v. County Ct.,* 854 P.2d 1341, 1344-45 (Colo. Ct. App. 1992)). "[T]he ultimate goal is to maintain both public and individual confidence in the integrity of our judicial system." *State ex rel. Romley v. Super.Ct.,* 908 P.2d 37, 43 (Ariz. Ct. App. 1995).

While the post-conviction court considered evidence of repeated misconduct by Mr. Henderson to be "of very little relevance," Attachment 1, 52 n.40, an uncorrected pattern of misconduct by a particular prosecutor or office would cause a reasonable person to question the prosecutors' ability or willingness to do justice and therefore lose confidence in the integrity of the judicial system. *C.f. Iowa Supreme Court Attorney Disciplinary Bd. v. Howe,* 706 N.W.2d 360 (Iowa 2005):

> One aggravating circumstance that supports this sanction is Howe's experience. *See Vinyard,* 656 N.W.2d at 131 (holding substantial experience in the practice of law is an aggravating factor). Howe has practiced law since 1975, and has served as a prosecutor since 1976. He should have known better than to serve clients with divided loyalties. In addition, as we have already noted, Howe's ethical misconduct was not an isolated event. *See id.* at 132 (stating pattern of misconduct is an aggravating factor). His failure to understand the most fundamental aspects of his ethical obligations to his clients and the court permeated his criminal practice and the performance of his prosecutorial duties...."

Id., 381. While not directly controlling on issues of disqualification, the consideration given to a pattern of misconduct in determining attorney discipline is instructive. The Tennessee Supreme Court considers a pattern of misconduct to be

an aggravating factor. *See, e.g., Sneed v. Board of Professional Responsibility of Supreme Court*, 301 S.W.3d 603 (Tenn. 2010):

> To determine the appropriate level of attorney discipline, we are guided by the *ABA Standards for Imposing Lawyer Sanctions* ("ABA Standards"). Tenn. Sup.Ct. R. 9, § 8.4. Section 3.0 of the ABA Standards identifies four factors to consider regarding the severity of a sanction: "(a) the duty violated; (b) the lawyer's mental state; and (c) the actual or potential injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors." Under section 9.22 of the ABA Standards, aggravating factors include, among other things, prior disciplinary offenses, a pattern of misconduct, multiple offenses, a refusal to acknowledge the wrongful nature of the misconduct, and substantial experience in the practice of law. The ABA Standards provide that disbarment is appropriate when "a lawyer engages in a pattern of neglect" that causes serious or potentially serious injury to a client, or when the lawyer "knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system." ABA Standards, §§ 4.41, 7.1.

Id., 617.

Presentation of false testimony in a capital case, which the post-conviction court has already found to have occurred here, is a severe and extreme injury to the criminal justice system and must be addressed. *See, e.g., In the Matter of Kenneth J. Peasley*, 90 P.3d 764, 773 (Ariz. 2004) (internal citation omitted):

> Recognizing a Government lawyer's role as a shepherd of justice, we must not forget that the authority of the Government lawyer does not arise from any *right* of the Government, but from *power* entrusted to the Government. When a Government lawyer, with enormous resources at his or her disposal, abuses this power and ignores ethical standards, he or she not only undermines the public trust, but inflicts damage beyond calculation to our system of justice. This alone compels the responsible and ethical exercise of this power.

> By presenting false testimony in the prosecution of two defendants charged with capital murder, Peasley violated one of the most important duties of a lawyer.

As the Arizona Supreme Court stated: "We cannot conceive of a more serious injury, not just to the defendants but to the criminal justice system, than a prosecutor's presentation of false testimony in a capital murder case." *Id.*

IV. This Court Should Appoint a Special Prosecutor

In the analogous case of *State v. Spurlock*, 874 S.W.2d 602 (Tenn. Crim. App. 1993), the State presented false testimony to secure the wrongful conviction of Robert Spurlock. Following discovery of the false testimony, and the opinion and order on direct appeal remanding for a new trial, a special prosecutor was appointed to take over the case. *Spurlock v. Thompson*, 330 F.3d 791, 795 (6th Cir. 2003) (noting that Tommy Thompson was appointed as District Attorney *Pro Tempore* for Sumner County with respect to the case).

Article 6, § 5 of the Tennessee Constitution empowers the courts to appoint a special prosecutor. The post-conviction court, prior to granting the Rule 9 application, expressed concern that any prosecutor who is a member of the District Attorneys General Conference might be conflicted due to an association with the Shelby County District Attorney's Office, and therefore not be an appropriate selection. Mr. Rimmer requests that this Court appoint a special prosecutor who is free from the taint of apparent conflict due to association with the District Attorneys General Conference or the Tennessee Attorney General.

CONCLUSION AND RELIEF SOUGHT

As shown above, both a conflict of interest and appearance of impropriety exist in this case. Immediate review is necessary to reduce the duration and expenses of this case. If the issues presented are not addressed during interlocutory appeal but are later addressed on an appeal of right, a great deal of money, time, and effort that necessarily will have been expended in the post-conviction proceedings and resulting appeal will have been for naught. Thus, immediate review is appropriate to save the expenditure of these resources.

The office which has tolerated and sheltered Mr. Henderson's pattern of withholding exculpatory evidence and categorically denied any wrongdoing in this case without investigation simply cannot be permitted to represent the State in this case. The actions of the court below irreparably harm Mr. Rimmer. Prosecutor disqualification must be decided now, before the evidentiary hearing.

The Applicant requests this Court to:

1. Grant an expedited extraordinary appeal;

2. Order further briefing and oral argument;

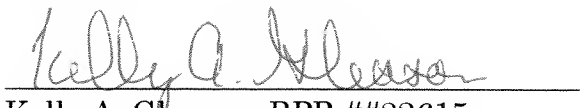
3. Enter an order overturning the lower court's finding that no conflict of interest or appearance of impropriety exist;

4. Enter an order appointing a special prosecutor; and

5. Order any further relief this Court deems necessary and just.

WHEREFORE, the Applicant respectfully requests permission to appeal pursuant to T.R.A.P. 10, and all other requested relief.

Respectfully submitted,



Kelly A. Gleason, BPR ##22615
Assistant Post-Conviction Defender

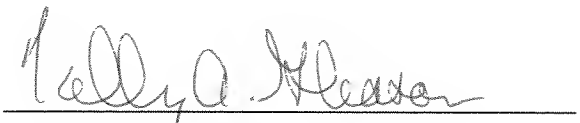
Daniel E. Kirsch, BPR #26863
Assistant Post-Conviction Defender

Office of the Post-Conviction Defender
P. O. Box 198068
Nashville, TN37219-8068
(615) 741-9331
(615) 741-9430 (fax)

Counsel for Petitioner/Applicant
Michael Dale Rimmer

CERTIFICATE OF SERVICE

I certify that a true and exact copy of this Application was sent by U.S. mail, first class, postage prepaid to Associate Deputy Attorney General Jennifer L. Smith, Criminal Justice Division, P.O. Box 20207, Nashville, Tennessee 37202-0207 and John Campbell, Deputy Attorney General, 201 Poplar Avenue, 3rd Floor, Memphis, TN, 38103-1947, on this the 3rd day of August, 2011.



Kelly A. Gleason